Reviewing Ontario's Human Rights System

Discussion Paper

ONTARIO
HUMAN RIGHTS
COMMISSION

ISBN 0-7794-8817-2
Available in various formats: IBM compatible computer disk, audiotape, large print
Also available on Internet: www.ohrc.on.ca

Disponible en français

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I. Executive Summary

Rationale for Consultation

The Ministry of the Attorney General, which has responsibility for Ontario's *Human Rights Code* (the "*Code*"), has indicated that it is committed to reviewing and strengthening Ontario's human rights system, and that it intends to develop a blueprint for change in the upcoming months. The Ontario Human Rights Commission ("OHRC") believes that there is a need, as well as an opportunity, to review the functioning of Ontario's human rights system, and to consider changes that will strengthen human rights protections in this province.

Over the years, stakeholders have expressed concerns about the functioning and effectiveness of the current human rights system in Ontario. Not surprisingly, given the diversity of these stakeholders, a wide range of views, sometimes conflicting, has been expressed at different times.

Human rights systems are complex and involve trade-offs between competing priorities, principles and interests. There have been many attempts in recent years to design an optimal model for advancing and protecting human rights and there has generally been recognition that all models present both benefits and drawbacks. A commitment to revitalizing Ontario's human rights system is a major undertaking. Any effort to do so, if it is to be successful, must be informed by a comprehensive understanding of how the system works and has worked historically, the breadth and interaction of the system's multiple functions, and the complexity of the challenges it currently faces.

Section 29 of the *Code* gives the OHRC extensive powers to further human rights in the province of Ontario. Pursuant to this mandate, the OHRC is initiating a broad, open, and transparent dialogue about Ontario's human rights system. This discussion will include reference to internationally recognized guiding principles in the area of human rights institutions will set the context for the potential development of solutions and possible reform.

Guiding Principles in Designing a Human Rights System

To establish a common, credible and neutral frame of reference in discussing such a complex system, the Discussion Paper primarily employs the United Nations' resolution known as the *Paris Principles*. The *Paris Principles* identify key responsibilities and roles for an effective human rights system to operate.

Any human rights system will need to ensure that each effectiveness factor identified in the Principles is addressed and optimally fulfilled. In the Paper, the specific effectiveness factors relevant to the discussion are explained and their application reviewed in the context of the current Ontario system. They are:

1. Independence
2. Defined jurisdiction
3. Cooperation
4. Adequate Power
5. Accessibility
6. Operational Efficiency
7. Accountability

In addition to international instruments, the Paper also reviews the legal requirements and principles governing administrative agencies in Canada, which complement and mirror the *Paris Principles*. These are encompassed in the area of administrative law and the accompanying duty of fairness.

Consultation Process

The Commission's consultation process aims to:

- Clarify the principles and elements of an effective human rights system;
- Create an opportunity for a broad and balanced discussion on the issues and options;
- Ensure a transparent and open process leading to change;
- Develop meaningful and viable conclusions that will support a revitalization of Ontario's human rights system; and,
- Assist in developing the best human rights system possible.

The release of this Discussion Paper is the first step in this consultation process, and is intended to provide a context and framework for public discussion on Ontario's human rights system. The Discussion Paper will be mailed out to stakeholders across the province. A questionnaire will be posted on the OHRC Web site to enable all interested individuals to share their thoughts on this issue. The OHRC will also be inviting selected stakeholders who represent a variety of perspectives to attend focus groups in September 2005. The results of the consultation will be reported to the public later in the fall.

II. Introduction

Section 29 of the *Code* gives the OHRC broad powers to further human rights in the province of Ontario.[1] Pursuant to this mandate, the OHRC is initiating a broad, open, and transparent dialogue about Ontario's human rights system and its guiding principles, as a precursor to discussions of solutions and the potential for reform.

While the OHRC is generally the focus of the greatest public attention, there are many players in Ontario's human rights system. The Human Rights Tribunal of Ontario ("the HRTO") plays a vital role; as does the government which funds the system, and to which the OHRC and HRTO are accountable; the legal clinics and private lawyers who provide representation and advice to individuals and institutions on compliance with the *Code*; the numerous administrative tribunals and government bodies which deal with related issues; and the various non-governmental organizations ("NGOs") and advocacy groups which represent the interests and needs of those protected by the *Code*. The system is a complex and multi-faceted one.

The OHRC is the oldest human rights commission in Canada, and has been in existence for well over 40 years. During that time, there have been many changes to the protections offered by the *Code*, however, the basic model for human rights in Ontario has remained essentially unchanged.

There have been many successes under this human rights model, and on several fronts, the OHRC is internationally recognized as a leader in its field. However, along with these successes, the OHRC currently finds itself facing significant challenges. In the face of increased demands on all of the OHRC's services, its budget remains at essentially the same level it was at a decade ago. Further, the OHRC is limited in its ability to control its own processes and target its resources by outdated legislation. The HRTO has also faced challenges.

Over the years, stakeholders have expressed concerns about the functioning and effectiveness of the current human rights system in Ontario. Not surprisingly, given the diversity of these stakeholders, a wide range of views, sometimes conflicting, have been expressed at different times. For example:

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[1] The functions of the OHRC under section 29 include:

- Forwarding the policy that the dignity and worth of every person be recognized and that equal rights and opportunities be provided without discrimination that is contrary to law;
- Developing and conducting programs of public information and education, and undertaking, directing and encouraging research designed to eliminate discriminatory practices that infringe rights under the *Code*; and
- Examining and reviewing any statute or regulation, and any program or policy made by or under a statute and make recommendations on any provision, program or policy that in its opinion is inconsistent with the intent of the *Code*.

- Timelines for complaints resolution are long[2]; at the same time, some consider OHRC investigations of complaints insufficiently in-depth to reflect the complexity and subtleties of the manifestations of discrimination;
- Complainants and their advocates state that they have too little control over the complaint process, while respondents feel that the system is biased against them;
- The OHRC is too rigorous in screening complaints and prevents access to the HRTO; alternatively, the OHRC is not rigorous enough in screening complaints;
- Either too much, or insufficient attention is accorded to the OHRC's public education and advancement functions;
- Systemic issues are not adequately addressed;
- The system is costly and inefficient; alternatively, the system is inadequately funded;
- The complaints resolution mechanism is insufficiently transparent (for example, the parties' submissions to the Commissioners are not cross-disclosed), but privacy issues are raised which prevent improved communications;
- While some advocate direct access to the HRTO, critics note that the HRTO's process is overly judicial and too formal, thereby disadvantaging those who cannot retain legal counsel[3]; HRTO hearings are unduly lengthy and excessively complex[4]; the HRTO takes an inordinate amount

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[2] In the fiscal year 2004-2005, the average age of active cases at the OHRC was 11.2 months, up from 10.8 months in the previous year. Of course, complaints that are resolved through up-front mediation have shorter processing times, while those that proceed through investigation to a decision under section 36 will take longer, particularly if they are complex cases. During this period, the approximate average age of cases closed by a decision under section 36 of the *Code* was 28.8 months. Complaints closed by a section 36 decision make up a relatively small proportion of all complaints closed: 440 out of 2,215 in 2004-2005.

[3] For example, concern has been raised that the HRTO requires parties to file a factum and generate case law on straightforward interim motions, such as amending a complaint to reflect the proper name of the corporate respondent, or ordering parties to provide detailed particulars in a manner that slows down the process. The concern is that these expectations not only make hearings more legalistic, expensive, and time-consuming, they also make the process more akin to civil litigation.

[4] An OHRC review of twenty-six of the most recent cases litigated to completion indicates that hearings before the HRTO are lengthier and more complex than before. The average human rights case requires approximately 10 hearing days in front of the HRTO. Of the twenty-six cases reviewed, fourteen (54 percent) took more than a year to complete from the first to last hearing date. One case before the HRTO has spanned more than 150 hearing days, over a period of years.

of time to issue its decisions[5]; and the lack of transcription services of Tribunal proceedings makes it extremely difficult for parties to appeal decisions and leads to a denial of natural justice[6].

It is essential for the effective functioning of a human rights system that it has the confidence of stakeholders and the broader public. Negative perceptions of the system, right or wrong, must therefore be given serious and thoughtful consideration.

At the same time, the state of the current system should also be analysed objectively based on a rational assessment of its strengths and weaknesses in light of current standards.

In recent years, the OHRC has made great efforts to address the challenges it faces to the extent possible through internal reform. To maintain current successes, and to further advance human rights protections in Ontario requires action beyond the OHRC's capacity to implement alone. The Ontario government has as part of its agenda a commitment to create safe, strong communities, and to increase the efficiency and effectiveness of the services it provides to the public. The Ministry of the Attorney General, which has responsibility for the *Code*, has indicated that it is committed to reviewing and strengthening Ontario's human rights system, and that it intends to develop a blueprint for change in the upcoming months.

The OHRC therefore believes that there is a need, as well as an opportunity, to review the functioning of Ontario's human rights system, and to consider changes that will strengthen human rights protections in this province.

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[5] Subsection 41(5) of the *Code* states that the HRTO is to make its decision within thirty days after the conclusion of a hearing. The Divisional Court has held that this time period is directory, not mandatory. In only one of the twenty-six cases reviewed did the HRTO issue its decision within the thirty day timeframe. On some occasions, the HRTO has taken more than a year from the last hearing date to issue its decisions (*e.g. Deroche v. Yeboah-Koree* (2005), CHRR Doc. 05-411, 2005 HRTO 26; *Cugliari v. Telefficiency Corporation et al.* (BI-0388-01 - decision pending)).

[6] In the ten years since the HRTO adopted its policy to not transcribe its proceedings, there have only been four appeals of HRTO decisions, two by the respondents and two by the OHRC: *Leroux v. Ontario (Human Rights Comm.)* (1999), 35 C.H.R.R. D/338 (Ont. Div.Ct.), *Jones v. Amway of Canada Ltd.*, (2002), CHRR Doc. 02-177 (Ont. Sup.Ct.); *Brockie v. Brillinger* (No. 3) (2002), CHRR Doc. 02-238 (Ont. Sup.Ct.); *Smith v. Mardana Ltd. et al.* (2005), CHRR Doc. 05-094 (Ont. Div.Ct.). Only one of these four appeals was successful: *Smith v. Mardana Ltd. et al.* (2005), CHRR Doc. 05-094 (Ont. Div.Ct.), where counsel's notes were used to make an informal record of proceeding.

III. Consultation Purpose and Process

Because of the importance of human rights, both for individuals and for society at large, careful and serious consideration must be given to the potential impacts of changes to the present system on all stakeholders.

Every Ontarian has a stake in the effective protection and advancement of human rights in this province. All Ontarians are affected, whether as individuals potentially subjected to discriminatory behaviour; in their roles as employers, service providers and housing providers; or as citizens impacted by the broad societal effects of discrimination. Difficult choices must be made, and the options carefully weighed.

Human rights systems are complex, and involve trade-offs between competing priorities, principles and interests. There have been many attempts in recent years to design an optimal model for advancing and protecting human rights, and there has generally been recognition that all models present both benefits and drawbacks. A commitment to revitalizing Ontario's human rights system is a major undertaking. Any effort to do so, if it is to be successful, must be informed by a comprehensive understanding of how the system works and has worked historically, the breadth and interaction of the system's multiple functions, and the complexity of the challenges it currently faces.

Given these considerations, this consultation aims to:

- Clarify the principles and elements of an effective human rights system;
- Create an opportunity for a broad and balanced discussion on the issues and options;
- Ensure a transparent and open process leading to change;
- Develop meaningful and viable conclusions that will support a revitalization of Ontario's human rights system;
- Assist in developing the best human rights system possible.

The release of this Discussion Paper is the first step in this consultation process, and is intended to provide a context and framework for public discussion on Ontario's human rights system.

The Discussion Paper will be mailed out to stakeholders across the province. A questionnaire will be posted on the OHRC website from August 23, 2005 until September 16, 2005 to enable all interested individuals to share their thoughts. The OHRC will be inviting selected stakeholders who represent of a variety of perspectives to attend focus groups in September 2005. The results of the consultation will be reported to the public later in the fall.

IV. Context

A. Role and Importance of Human Rights Commissions

No human rights institution, no matter how constituted or resourced, can single-handedly protect and advance human rights. An effective human rights system relies on the cooperation and participation of many players, including government, NGOs, advocates, unions, and associations, to name just a few. However, human rights commissions in Canada and abroad have played a distinct and important role in society. Commissions have been a cornerstone of a Canadian human rights system that has been lauded, envied, and modelled around the world.

International human rights bodies have identified the importance of human rights institutions. In 1993, the United Nations General Assembly adopted the *Principles Relating to the Status of National Institutions* ("*Paris Principles*") [7] to set international standards for the effectiveness and independence of human rights commissions, and to ensure their proper functioning. The *Paris Principles* emphasize the importance of creating and maintaining human rights institutions that are vested with competence to protect and promote human rights, and that have as broad a mandate as possible to do so.

In Canada, the Canadian Association of Statutory Human Rights Agencies has also spoken out on the importance of human rights commissions with broad mandates: [8]

> ... there is a need for independent human rights commissions with broad mandates...the capacity to identify issues and to speak out is an important part of a commission's mandate to promote awareness of and respect for human rights. At the same time, an ability to receive and investigate individual complaints is also recognized as an important and common function of a commission. Particularly important as well...is its capacity to initiate, join in or intervene in human rights cases before a tribunal or at a higher court as an expert and independent body representing the public interest.

There have also been several studies over the past decade echoing this conclusion. [9]

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[7] *Principles Relating to the Status of National Institutions*, annex to *National Institutions for the Promotion and Protection of Human Rights*, CHR Res. 54, UN ESCOR, 1992, Supp. No. 2 of UN Doc. E/1992/22, chap. II, sect. A; GA Res. 48/134, UNGAOR, 1993, Annex. Please refer to Appendix 1.

[8] "Submission by the Canadian Association of Statutory Human Rights Agencies Regarding The Government of British Columbia's Draft *Human Rights Code Amendment Act:* Bill 53" (Submission to the Attorney General of British Columbia, September 2002).

B. Ontario's Current Human Rights Compliance System

The OHRC is responsible for carrying out a broad range of interrelated roles. The OHRC has wide discretion in fulfilling its responsibilities for human rights promotion, advancement, and education, and its activities in these areas have taken on a variety of forms. Its complaint processing responsibilities are subject to significant legislative requirements.

Under its legislation, the OHRC is required to receive all complaints that are filed by individuals claiming an infringement of their rights. Generally, a complainant's first contact with the OHRC is through its Inquiry and Intake office, which provides advice and information on human rights-related matters. Where an individual wishes to file a complaint, he or she is provided with complaint forms. Complainants with special needs (for instance, related to a disability) may receive assistance in drafting the complaint. The complaint, once filed, is served on the respondent, who is required to provide the OHRC with a written response to the complaint. This response is shared with the complainant.

The Commissioners[10] may decide to not deal with a complaint because: the circumstances occurred outside the *Code*'s six month filing requirement; there is another more appropriate forum that might first address the complaint; the

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[9] In 2000, the Canadian Human Rights Review Panel clearly identified the continued need for human rights commissions in Canada, and recommended in particular that the Canadian Human Rights Commission be strengthened to carry out a host of functions involving both promotion and protection of human rights (Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision*, (Ottawa: Canadian Human Rights Act Review Panel under the authority of the Minister of Justice and the Attorney General of Canada, 2000)(Chair: Gerard La Forest)).

In December 2001, Canada's Parliamentary Standing Senate Committee on Justice and Human Rights gave a similar message, acknowledging that the mandates of human rights commissions in Canada are important in preventing future discrimination and human rights violations. They further stated that commissions have the mandate to review proposed legislation and policies, and, when they are able to conduct these analyses and publicize their findings, this aspect of their work can be invaluable not only for the general public, but also for parliamentarians (Senate of Canada, Standing Committee on Human Rights, *Promises to Keep: Implementing Canada's Human Rights Obligations,* Sessional Paper No.1/37-607S (13 December 2001).

[10] Under section 27(1) of the *Code*, no fewer than seven Commissioners are appointed to the OHRC by the Lieutenant Governor in Council, which also fixes their remuneration and allowances. Commissioners make decisions under section 34 and 36 of the *Code*, approve settlements under section 43 of the *Code*, and approve the OHRC's policies and guidelines, among other functions.

subject matter of the complaint is not within the OHRC's jurisdiction, or, there is evidence that the complaint was frivolous, vexatious or made in bad faith[11].

The *Code* obliges the OHRC to try to settle a complaint. Following receipt of the respondents' response, the complaint is referred to the OHRC's Mediation office, and the parties are offered the option of mediation. Complaints that cannot be resolved through mediation are referred to investigation. An investigation officer conducts an impartial investigation, which includes interviewing witnesses and gathering documentary evidence. Investigation officers attempt conciliation during the investigation process. Parties may reach a settlement at any stage of the process, and the complaint will then be considered completed and closed. Cases are also closed where the complainant has withdrawn or no longer wishes to participate in the complaints process. Following investigation, a Case Analysis Report is drafted by OHRC staff and disclosed to the parties, who may then make submissions based on it. The Case Analysis Report, together with the parties' submissions and the complaint and response are put before the Commissioners, who make a decision as to whether or not there is sufficient evidence, and the procedure is appropriate, to warrant referral to the HRTO for a hearing[12].

The complainant can ask the Commissioners to reconsider a decision by filing an application for reconsideration[13]. The OHRC will advise the respondent of the complainant's request for reconsideration. The OHRC will consider the request and make its decision known to both parties. The OHRC's decision at this point is final and there is no right to appeal by either party.

Where complaints are referred to the HRTO, the HRTO undertakes mediation, which results in the resolution of a significant number of cases. Where the case is not resolved, the HRTO hears evidence and decides whether or not discrimination occurred and what needs to be done to remedy the situation and prevent further discrimination. The HRTO is independent from the OHRC. The OHRC, the respondent and the complainant are each separate parties before the HRTO. The OHRC is responsible for presenting evidence about the complaint to the HRTO, although the complainant has the right to make separate submissions. The OHRC does not represent the complainant or the respondent at the HRTO. The respondent and the complainant may each retain their own legal counsel. Any party to a complaint may seek to appeal a decision of the HRTO to a higher court.

As can be seen, the requirements of the *Code* with respect to the OHRC's compliance functions have given rise to a regime of considerable administrative

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[11] See s. 34 of the *Code*.

[12] See s. 36 of the *Code*.

[13] See s. 37 of the *Code*.

complexity. Complaints pass through numerous stages, at each of which considerations of administrative fairness, accessibility, efficiency and effectiveness must be balanced. The process-laden nature of this complaints scheme contributes significantly to lengthy case resolution times.

As Ontario has the largest and most diverse population in Canada, it is not surprising that the OHRC has the highest caseload per capita in the country, or that the issues brought to the OHRC for resolution are increasingly complex and challenging. The increasing complexity of complaints requires greater expertise and investment of resources at all stages of the process, from inquiries, through mediations, investigations, and litigation. This too has an impact on the length of time required to resolve complaints.

Both the size and the age of the caseload continue to be challenges for all human rights commissions. The OHRC has little control over the size of its caseload since the number of complaints in the system depends to a large extent on the number of complaints filed in any given year. The *Code* requires that the OHRC accept all complaints individuals wish to file, even those where the OHRC has informed an individual that the matter does not fall under the *Code*.

As discussed previously, over the past ten years, the OHRC's budget has remained largely flat: in 2004-05 the budget was $12,519,000, compared with $11,306,000 in 1995-96. The current OHRC budget amounts to merely one dollar per Ontarian per year. Yet, the demands on the OHRC's resources have continued to grow and become more challenging. Nowhere are these pressures more evident than in the OHRC's caseload. In 2004-2005, the Commission received 2,399 new complaints, about 17% higher than the average number of complaints filed over the past five-year period from 1999 to 2004. On March 31, 2005, the number of active cases at the OHRC was 2,733. This represents an increase of 7.2% over last year's caseload of 2,549 cases. As a result, the average age of the OHRC's caseload has begun to increase. It now stands at 11.6 months. If new complaints continue to be filed at the current rate of over 240 per month, with no other changes to the system, the OHRC will see an ongoing increase in its inventory and aging of cases.

The increase in the number of complaints being filed with the OHRC is possibly due to several factors. The success of the OHRC's policies and public education on a wide range of issues has raised civic awareness about human rights and the role of the OHRC. The OHRC's groundbreaking work in areas such as racial profiling and the accommodation of students with disabilities has enhanced public confidence and encouraged individuals to seek remedies for discrimination. Further, the failure of other administrative bodies to adequately address matters within their own jurisdictions is resulting in individuals turning to the OHRC's complaints mechanism for redress. For example, the Special Education Tribunal ("SET") established under the *Education Act*[14] to hear matters

[14] *Education Act*, R.S.O. 1990 c. E.2.

relating to students with special needs only has the jurisdiction to hear cases on a narrow range of issues affecting these students. Consequently, individuals have no choice but to come to the OHRC to obtain redress on a wide range of educational issues with which the SET does not deal. Whereas the SET deals with about 4 cases per year, the OHRC hears dozens of cases annually on issues affecting students with disabilities alone.[15]

The volume and pressure of individual cases also limits the ability of the OHRC to fully address the many systemic issues that require attention. The resolution of individual complaints may provide opportunities for the resolution of systemic issues – for example, through the imposition of public interest remedies, or precedent-setting tribunal and court decisions. However, as many have noted, individual complaints may not always be the most effective way to tackle broad issues that involve numerous players.

The demand on other OHRC functions is also increasing. For example, in 1995-96, the OHRC conducted 38 public education events, reaching 1,384 individuals. By way of comparison, in 2004-05, the OHRC conducted 96 public education events, reaching an audience of 7,500 individuals.

Even in the face of these challenges, the OHRC has continued to achieve many successes. Despite the increase in complaints received, the OHRC has continued to maintain a current caseload (*i.e.*, the average age of cases in the inventory is less than 12 months). At the same time, the OHRC also referred 150 cases to the HRTO in 2004-2005. In the area of litigation, the OHRC has been involved in a number of high profile cases that have added to the body of human rights case law.[16] The OHRC has also continued to take a leadership role in

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[15] The OHRC has become the primary complaints mechanism for a range of other administrative schemes as well. For example, despite strong input from the OHRC, the new *Accessibility for Ontarians with Disabilities Act* does not contain its own complaints mechanism and individuals must continue to come to the OHRC for redress on a wide number of disability issues; the Workplace Safety and Insurance Tribunal, though vested with some authority to deal with disability accommodation issues, does not have the authority to provide damages or address the public interest and, as a result, the OHRC is left to deal with these issues; and, many wishing to file complaints against police officers choose to go to the OHRC due to a lack of confidence in the civilian complaints process. Various government initiatives have also contributed to the growing numbers of complaints being filed with the OHRC. For example, the Ontario government's decision in 1995 to repeal the *Employment Equity Act* resulted in the OHRC becoming the primary body to which individuals experiencing discrimination in employment turn; and the government's proposal to abolish mandatory retirement may result in the OHRC receiving an increased number of complaints from older Ontarians relating to age discrimination in employment. Despite these extra pressures, the OHRC has not received a corresponding increase in its funding to deal with these matters.

[16] See for example: *Brockie v. Brillinger*, which involved a balancing of individual religious rights and individual rights to protection from discrimination in the marketplace based on sexual orientation (*Brockie v. Brillinger* (No. 2) (2002), 43 C.H.R.R. D/90 (Ont. Sup.Ct.)); *Kearney v. Bramalea Ltd.*, an OHRT ruling that use of minimum income criteria or rent-to-income ratios by

policy development[17], public education, and providing policy advice to government[18].

C. History of Human Rights Reform

Throughout the last several years, there have been numerous reviews of human rights systems at both the provincial and federal levels.

In 1992, the Cornish Report[19] reviewed human rights enforcement procedures under the Ontario *Human Rights Code*. The Report recommended that complainants have direct access to a human rights tribunal, with legal representation to be provided by publicly-funded advocacy services. The primary functions of the OHRC would be to conduct education and research, as well as to investigate complaints of a systemic nature.

In 1994, Bill Black, Special Advisor to the Government of British Columbia, published a report on human rights that examined that province's human rights legislation and made recommendations for both statutory and administrative reform in that province[20]. The report recommended that the province's human rights commission initiate, investigate and mediate complaints; intervene in

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landlords when assessing applications for tenancy can prevent individuals from accessing housing based on their sex, race, marital status and family status, to name a few (*Kearney v. Bramalea Ltd. (No. 2)* (1998), 34 C.H.R.R. D/1 (Ont. Bd. Inq.); and *Naraine v. Ford Motor Co. Ltd.*, which represented a significant step forward for cases involving race discrimination through its ruling that harassment poisoned the complainant's work environment which ultimately led to his dismissal (*Naraine v. Ford Motor Co. of Canada (No. 4)* (1996), 27 C.H.R.R. D/230 (No. 4) (Ont. Bd. Inq.) aff'd (1999), 34 C.H.R.R. D/405 (Ont. Ct. (Gen. Div.)), Board of Inquiry's order upheld except with respect to the issue of reinstatement (2001), 41 C.H.R.R. D/349 (Ont. C.A.), leave to appeal denied [2002] S.C.C.A. No. 69).

[17] To date, OHRC policies and guidelines have covered such topics as: sexual harassment, sexual orientation, gender identity, pregnancy and breastfeeding, disability and the duty to accommodate, drug and alcohol testing, creed and the accommodation of religious observances, age discrimination against older persons, accessible education for students with disabilities; and most recently, racism and racial discrimination.

[18] In 2004-05, the OHRC provided policy advice to government on matters such as the discriminatory effect of school discipline policies, the police complaints review process, mandatory retirement, the regulation of the private security industry, and various policies and pieces of legislation, including the *Accessibility for Ontarians with Disabilities Act*.

[19] Ontario Human Rights Code Review Task Force, *Achieving Equality: A Report on Human Rights Reform* (Toronto: Government of Ontario, 1992) (Chair: Mary Cornish).

[20] Black, Bill, *B.C. Human Rights Review: Report to the Ministry Responsible for Multiculturalism and Human Rights*. (Vancouver: B.C. Ministry Responsible for Multiculturalism and Human Rights , December 1994).

complaints with a public interest component; develop and implement education and information programs; conduct research into equality issues; and inquire into potentially discriminatory practices. The report recommended that the province's human rights tribunal be responsible for adjudicative functions, including conducting hearings and reviewing decisions of the B.C. Commission.

In 2000, the Honourable Gerard La Forest published a report on his findings and recommendations after conducting a comprehensive review of the *Canadian Human Rights Act* ("*CHRA*"). The La Forest Report[21] recommended that the *CHRA* should place more emphasis on public education and addressing systemic discrimination. It also recommended that complainants have direct access to a hearing by a human rights tribunal with legal representation provided to complainants (and respondents who demonstrate need) by a publicly funded legal clinic. In this model, the primary functions of the Canadian Human Rights Commission would be to assist complainants in drafting and filing their complaints, initiate complaints where discrimination is systemic or a resolution is in the public interest, and promote human rights through public education.

Between 2000 and 2003, the Nova Scotia Human Rights Commission ("NSHRC") conducted a comprehensive review of its organization to both address concerns about its service delivery and respond to national human rights trends. The NSHRC released a discussion document, held a series of public consultations, and released a consultation report outlining its findings. Its key findings related to the NSHRC's mandate, priorities, organizational design and work processes.

In 2003, the Quebec Human Rights Commission conducted a review of its *Charter of Human Rights and Freedoms* in consultation with a wide range of stakeholders and interested parties. Following this, a report was released which contained twenty-five recommended amendments to the Quebec *Charter* to ensure its effectiveness in the face of modern challenges. The report includes recommendations that the Quebec Commission be given greater independence and that its mandate and jurisdiction be expanded.

In 2004, the New Brunswick Human Rights Commission published a position paper on human rights renewal in New Brunswick. The paper was based on a comprehensive review of New Brunswick's *Human Rights Act* and feedback solicited from a broad stakeholder base over the course of two years. The paper recommended reforms to that province's human rights legislation to allow the Commission to better serve the interests of the public. Proposed amendments

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[21] Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision*, (Ottawa: Canadian Human Rights Act Review Panel under the authority of the Minister of Justice and the Attorney General of Canada, 2000) (Chair: Gerard La Forest).

included adding new grounds, increasing the independence of the Commission and "address[ing] the perennial budget shortfall faced by the Commission that limits its ability to provide effective, efficient and timely services."

Also in 2004, the Canadian Human Rights Commission ("CHRC") embarked on a similar consultative process, with the aim of "proposing its perspective on the adjustments needed to make the human rights system even more effective in the 21st century". The CHRC believes that while aspects of its enabling Act need to be updated to further its original intent, the changes need not be major.

Like other human rights commissions, the OHRC has recognized that reflection and reform are essential if it is to successfully meet the challenges it faces. The OHRC has, for the past several years, consistently requested that the government either make amendments to the *Code* that would improve its efficiency and ability to deal effectively with its caseload, or increase its budget to enable it to fully achieve its mandate. In lieu of such changes, the OHRC has undertaken significant internal reforms to maximize its effectiveness within current structures and resources, as outlined below.

D. History of Internal Reform at OHRC

The past several years have seen significant challenge and change in the operations of the OHRC. These changes took place in a context of dynamic external circumstances including changes in government and new legislative agendas, budget constraints, and reviews of government agencies along with a number of significant human rights tribunal and court decisions, shifts in the public policy landscape, and growing demand for the OHRC's varied services.

During this period, the OHRC deployed a number of creative strategies and initiatives to greatly improve the efficiency and effectiveness of its operations and services, while not compromising on the broad exercise of its mandate.

These initiatives have included:

- internal restructuring of different branches and offices of the OHRC;
- centralization of the OHRC's Inquiry and Intake services;
- cost-saving tele-work arrangements for OHRC staff working in different regions of the province;
- implementation of voluntary mediation services as an alternative approach towards complaint resolution;
- effective use of information technology for both case management and public education; and most recently,
- the introduction of a new self-draft complaint process to speed up the filing of complaints.

The United Nations' *Paris Principles* recognize that "operational efficiency" is one of the key elements, along with "adequate resources", for the effective functioning of commissions. Operational efficiency includes: effective working methods and rules of procedure for service delivery; personnel practices that encourage retention of efficient, representative, impartial and well-trained staff; and, self-evaluation by institutions with a view to continuously improving their own effectiveness. These have all been central in the OHRC's restructuring initiatives.

At the same time, the pursuit of operational efficiency in a commission's compliance function should not compromise the institution's ability to engage in its other mandated functions for the promotion and advancement of human rights.

The OHRC has also taken steps to give renewed emphasis to the preventive aspects of its mandate, and to more effectively dealing with systemic issues, including closer integration of its various functions, greater emphasis on public interest remedies in all settlements in which the OHRC is involved, and increased use of its broad powers under section 29 of the *Code*.

E. Cost Considerations

Sufficient resources are essential to an effectively functioning human rights system. As mentioned previously, the OHRC has been functioning with essentially the same budget levels for the past ten years, despite an increased demand on its resources. This situation has posed significant challenges. At the release of the OHRC's 2004-2005 Annual Report, Chief Commissioner Keith Norton commented, "I am concerned that in the face of a growing caseload and little foreseeable action in response by the government to repeated requests from the OHRC over the past number of years for procedural amendments to the *Code* or additional resources, the OHRC is facing a daunting challenge regarding its capacity to function effectively."[22]

The current government has promised Ontarians that it will "deliver real, positive change by improving the public services Ontarians depend on" and that it will do this by "first secur[ing] the fiscal foundation upon which those services are built."[23] Cost-effectiveness is a critical objective in the operation of any publicly-

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[22]Keith Norton, (comments on the release of the OHRC's *Annual Report 2004-2005*, press conference at Queen's Park, Toronto, July 12, 2005) [unpublished].

[23] *Speech from the Throne : Strengthening the Foundation for Change*, address on the opening of the First Session of the Thirty-Eighth Parliament of the Province of Ontario, Hansard L002 – Thursday 20 Nov 2003. Online: Legislative Assembly of Ontario, Hansard, House Business <http://www.ontla.on.ca/hansard/house_debates/38_parl/Session1/L002.htm>

financed system. However, other considerations must be given at least equal consideration, such as ensuring that the public can access an impartial, accessible, accountable and expert body if they have experienced discrimination; accounting for the power imbalance that frequently exists between complainants and respondents; and ensuring that the public interest is protected. Human rights issues invoke more than disputes between two parties.

It must be recognized that any human rights system will engender costs if it is to function effectively. In Ontario's current system, human rights services are centralized and the government provides a set budget to both the OHRC and to the HRTO. Both entities are responsible for fulfilling their legislated mandates within these respective budgets, and for accounting to government on how this money is spent. There are other human rights models that are less centralized, with functions being performed by various players, sometimes in the private sector.

When considering cost-effectiveness, all costs must be considered. In a centralized system, costs will be more readily apparent. In a system where roles have been delegated to private actors, costs may still be incurred, but may be more difficult to monitor or manage. For example, in a system where complainants had direct access to the HRTO, investigation of complaints would generally be conducted by legal clinics or members of the private bar on behalf of their clients. The cost and effectiveness of such investigations would be difficult to track. When the cost-effectiveness of a human rights system is being considered, one must therefore take into account both hidden and visible costs, and how accountability for cost-effectiveness can be ensured.

Another important factor to be considered is who can best afford to bear the inherent costs of a human rights system. For example, in a system where individuals bear increased responsibility for investigating and litigating their own human rights complaints, the financial burden could prove a significant deterrent to bringing forward human rights issues, unless steps were taken to assist with the burden of such costs.

As noted previously, the OHRC currently deals with a number of issues that could also be dealt with by other administrative bodies, such as the SET or the WSIAT. When considering the cost-effectiveness of a human rights system, thought must be given to whether functions (and therefore costs) have been allocated to the appropriate public system.

In a similar vein, where a human rights system leads to an increased likelihood of judicial review, the cost implications must be taken into account. [24]

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[24] Since all models for dealing with human rights matters effectively involve "gatekeeping" at some level (*i.e.* at a commission level or at a tribunal level), it is important to consider the potential for judicial review and how this may be minimized depending on the particular model used. Under the current system, there have been relatively few judicial reviews of human rights

Finally, when changes to a human rights system are being contemplated, it is important to be clear on whether the new system will be required to operate within current resources, or whether an increased investment is required. As well, it must be remembered that movement to a new system will inevitably involve transitional costs.

V. Guiding Principles

A. The Paris Principles

Changes to any human rights system must be weighed against guiding principles that increasingly underlie all contemporary human rights models. Since the *Universal Declaration of Human Rights*[25] in 1948, the international community has been involved in an ongoing process to identify and detail the nature of these principles. The basis of this strategy has been the development of a body of international standards and rules aimed at guiding the formation of human rights systems across the world. These standards and rules have formed key elements of international treaties and thus have become embodied in the corpus of international law. When countries ratify these treaties they undertake to make their laws and human rights provisions comply with these universal human rights principles. Canada has ratified or acceded to all key United Nations instruments related to human rights.[26]

State human rights institutions, referred to as "national institutions" in United Nations ("U.N.") documents, play a central role in the wider human rights system envisioned by U.N. treaties. Such institutions include government-established

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decisions. This is largely as a result of three factors: (1) a more integrated approach within the OHRC that allows the OHRC's legal services branch to provide advice to OHRC decision makers; (2) more reasonable decision making on the part of the OHRC; and (3) the development of a more deferential standard of review with respect to decisions that fall within the OHRC's discretion, in part out of an acknowledgement of the OHRC's expertise.

[25] *Universal Declaration of Human Rights, GA Res. 217(III), UN GAOR, 3rd Sess., Supp. No. 13, UN Doc. A/810 (1948).*

[26] These include: *International Covenant on Civil and Political Rights*, 19 December, 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46; *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195, Can. T.S. 1970 No.28; *Convention on the Rights of the Child*, 20 November 1989, GA Res. 44/25, Can. T.S. 1992 No. 3; *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 U.N.T.S. 13, Can. T.S. 1982 No. 31; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, GA Res. 39/46, Can. T.S. 1987 No. 36.

human rights commissions and agencies and ombudsman offices. In recognition of this vital role, the U.N. has convened a number of gatherings focused on clarifying and strengthening the role of such institutions, and has developed guidelines establishing appropriate standards and goals. These efforts culminated in the endorsement of the *Paris Principles* by the U.N. General Assembly on December 20, 1993.[27]

The *Paris Principles* affirm that state institutions are to be vested with competence to promote and protect human rights and be given as broad a legislative mandate as necessary to fulfill this aim. The *Paris Principles* identify key responsibilities and roles that may be fulfilled by national institutions for an effective human rights system to operate, and provide detailed guidelines on the structural makeup of such institutions.

The *Paris Principles* represent the collective wisdom of the international community regarding the effective operation of state institutions in the context of a wider human rights system, and establish legal obligations for countries, like Canada, which have affirmed these principles at the U.N.

B. Effectiveness Factors Requiring Consideration

The *Paris Principles* were established to provide guidance for the development and enhancement of national institutions in a wide variety of contexts. They do not directly provide guidance on ways to reform mature human rights systems like that found in Ontario. However, supporting these *Principles* are a number of "effectiveness factors" for state institutions that have been advanced by the United Nations Centre for Human Rights[28]. These effectiveness factors are adapted below to help inform the discussion on reform of Ontario's human rights system. The specific effectiveness factors that are relevant to this discussion are:

1. Independence
2. Defined jurisdiction
3. Cooperation
4. Adequate Power
5. Accessibility
6. Operational Efficiency
7. Accountability

In keeping with Canada's international commitments, these seven effectiveness factors represent principles against which any reform to Ontario's human rights

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[27] Please see Appendix 1 for full text of the Paris Principles.

[28] Centre for Human Rights, United Nations, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion of Human Rights*, Professional Training Series No. 4, (New York and Geneva: UN, 1995) Ch. II (A) at 66.

system should be measured. Any alteration of the existing human rights system will need to ensure that each identified effectiveness factor and the sum of all factors is adequately preserved and optimally fulfilled.

1. Independence

An effective human rights system requires the establishment of state institutions that are capable of acting independently of power brokers in society, particularly government. Otherwise, they are prone to being dominated by the interests of governments and powerful stakeholders.

By definition, state institutions are constituted by government and hence are not fully independent. However, measures need to be guaranteed, preferably in the founding charters of these institutions, to ensure that an institution maintains adequate independence to discharge its responsibilities effectively.

Independence can be formulated to include three elements: legal and operational autonomy, financial autonomy, and appointment and dismissal autonomy.

Legal and operational autonomy is necessary to allow an institution to exercise independent decision-making and operation. Measures aimed at providing legal and operational autonomy include the granting of separate and distinct legal personality to an institution. Ideally, this will include a mechanism of direct reporting to a legislature.

Financial autonomy is necessary to ensure that government funders do not employ financial punishments or inducements to inappropriately direct human rights activity. Measures aimed at financial autonomy commonly include identification of the source and nature of funding in the founding legislation and the ability granted to state institutions to independently draft budgets secure from the interference of affiliated ministries or arms of government.

Appointment and dismissal autonomy is necessary to ensure that members and staff of state institutions are independent and qualified individuals who are able to exercise, both individually and collectively, independent judgment and action. Measures aimed at this type of autonomy include the specification of terms and conditions of membership in the founding legislation of institutions.

Under the current system, the OHRC operates under the *Code*, legislation that establishes the OHRC as an independent agency of government affiliated to a government ministry, currently the Ministry of the Attorney General. The *Code* specifies terms and conditions for OHRC members. The OHRC does not directly report to the legislature, a concept that is advanced as the ideal by international guidelines. Customarily, the OHRC has been granted considerable deference in its activities by affiliated Ministries. For example, the government has not interfered with the OHRC's ability to pursue complaints in which the government

is the respondent, or to raise controversial issues regarding government policies and programs. The OHRC is subject, however, to the government protocols and mandates regarding hiring, management of its budget, and control over its resources. For example, where the government has placed restrictions on hiring, the OHRC cannot chose to manage the demands on its resources by hiring more staff, while cutting back on other expenditures.

From the perspective of this effectiveness factor, concern could be raised with regard to whether the OHRC should be reporting directly to the legislature, as is the ideal, and whether current Ministry control of the OHRC's finances allows the OHRC sufficient financial autonomy to fulfill its broad human rights mandate.

2. Defined jurisdiction

An effective human rights framework must have a clearly defined jurisdiction for established state institutions. Such a definition of jurisdiction should cover off a wide mandate to protect and promote human rights including the following specific functions. The *Paris Principles* outline the following functions:

- Review legislation and administrative decisions;
- Examine alleged violations of human rights;
- Prepare reports;
- Express opinions on the position or reaction of government to human rights evaluations;
- Conduct research, education, and publicity programs;
- Promote and ensure the harmonization of legislation, regulations and practices with international human rights instruments; and
- Protect and promote the public interest.

These functions have been incorporated in varying ways in different states, depending on their context and the level of maturity of the human rights system.

Defining jurisdiction is essential to effectively direct resources towards priorities, empower constituencies served, and coordinate the activities of related institutions with other actors in the human rights system.

Most state institutions have their jurisdiction defined for them in founding legislation. Such legislation must clearly identify subject matter jurisdiction that is adequate to fulfill minimum international obligations and contextually appropriate objectives and priorities. In addition, the legislation must identify specific functions that are sufficient to fulfill the objectives and priorities established.

In the current system, the OHRC and the HRTO carry out a wide range of interdependent functions. Section 29 of the *Code* gives the OHRC a broad

mandate to advance the vision of the *Code*. Currently the emphasis of the OHRC is on the following functions:

- **Educating** the public through presentations, publications, public awareness campaigns and cooperation with key stakeholders;
  This includes making presentations to employers, unions, educational institutions, professional associations and conferences, as well as public awareness campaigns. Information is also provided to the public through plain language publications and the website, as well as through press releases, news conferences, and media interviews.

- **Advancing understanding** of human rights through research, public consultations, and policy development;
  This includes public consultations on issues of concern, such as racial profiling, age discrimination, or the experiences of students with disabilities; as well as the production of policies and guidelines that provide guidance to the public as well as guide the resolution of complaints received by the OHRC ; and the development of research papers on topics such as intersectionality of grounds, and social and economic rights.

- **Preventing** discrimination through proactive initiatives to seek voluntary compliance;
  Each year, the OHRC conducts 10-12 inquiries of varying degrees into issues of public interest. These involve informing parties about potential human rights concerns, and seeking voluntary compliance with the requirements of the Code. For example, in the OHRC's restaurant initiative, 24 major restaurant chains agreed to take voluntary measures to improve accessibility beyond the Building Code requirements, in order to meet the standards of the Code relating to disability.

- **Advising** government, institutions and individuals on issues related to human rights;
  Through its Inquiry office, the OHRC provides written and telephone human rights advice to close to 50,000 individuals each year, including advice to potential complainants and respondents as to steps they can take to prevent and resolve human rights issues . The OHRC provides government and major institutions with advice on human rights issues of concern, such as mandatory retirement, police complaints systems, and the education of students with disabilities.

- **Initiating** complaints regarding human rights issues;

The OHRC has the power to initiate its own complaints, and has recently done so with regard to the impact of safe schools legislation and discipline policies on racialized students and students with disabilities, and restaurant accessibility.

- **Receiving and screening** complaints to identify those that merit a full hearing;[29]

  Through its Inquiry and Intake office, the OHRC provides advice to potential complainants on whether their complaints fall within the Code, or could be dealt with elsewhere. As noted elsewhere, the OHRC has the power to dismiss complaints without investigation under section 34 of the Code, for example, where the complaint is outside the OHRC's jurisdiction, or is more than six months old. Following investigation and attempted conciliation, the OHRC dismisses those cases where it appears that the evidence does not warrant a hearing or the procedure would not be appropriate. Of the 440 cases decided under section 36 in 2004-2005, 150 were referred to the HRTO for a hearing; 290 were dismissed.

- **Providing mediation and conciliation services** to assist individuals in resolving their human rights disputes;

  The OHRC provides mediation services prior to investigation of complaints, which give parties the opportunity to resolve matters using formal mediation techniques. As well, conciliation is offered throughout the investigation process. In 2004-2005, 73% of all cases in which mediation was attempted were settled. On average, close to 40% of all complaints filed with the OHRC are successfully mediated or conciliated.

- **Investigating** human rights complaints;

  Investigations range from the simple to the complex. In keeping with Ontario's increasing diversity, and advances in understanding of human rights, the complaints that come to the OHRC have become increasingly complex, and more challenging to investigate. Investigations generally involve witness interviews, and the collection of documentary evidence. In systemic cases, this may involve the gathering of considerable statistical and expert evidence, and extensive witness interviews. Investigations at the OHRC are carried out in coordination with the policy and legal functions, so that case law and the OHRC policies and guidelines inform the investigation and final recommendations.

- **Litigating** human rights complaints to provide individual redress, address systemic issues and advance the case law;

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[29] See sections 34 and 36 of the *Code*.

The OHRC represents the public interest in hearings into complaints before the HRTO, and has advanced the case law in a number of areas, ranging from drug and alcohol testing, to balancing of rights, to poisoned workplaces. As well, the OHRC intervenes in court cases where key public interest issues are at stake, such as religious accommodation and same-sex marriage.

- **Protecting the public interest** in the resolution of complaints;
  Most settlements reached under the guidance of the OHRC include some form of public interest remedy, such as training, development of internal policies to prevent the recurrence of the issue, or commitment to invest in more accessible facilities or equipment.

- **Enforcing** the orders of the HRTO.

The HRTO currently:

- **Adjudicates** human rights complaints to determine whether a right of a complainant has been infringed, and who infringed the right. Where an infringement has been found, it decides on remedies to be ordered to achieve compliance with the *Code* and make restitution for losses arising from the infringement.

The OHRC's various functions are interdependent. For example, the policies adopted by the OHRC are integrated into the complaints process to ensure a consistent approach. These policies, together with case law, frame the submissions of the OHRC at the HRTO and before the courts, effectively promoting human rights, and resulting in sector-wide remedies. As well, the OHRC's regular exercise of its ability to speak out on human rights matters and deliver public education is enhanced by its compliance role.

Although the main emphasis of the compliance mechanism is on individual complaints, all of these roles can, and at times have been, used to address systemic issues.

All of these functions are important elements of a human rights system. It is, however, open to debate as to whether all of these roles are best performed by a human rights commission.

From the perspective of this effectiveness factor, the concern could be raised that the subject matter jurisdiction provided by the *Code* is limited in comparison with international conventions that broadly afford protections

to economic, social, cultural, and political rights[30]. For example, protected grounds identified in the *Code* do not include items like social class and political affiliation, grounds to which international conventions clearly refer.

The current mandates of the OHRC and the HRTO appear to cover the full range of functions identified above for effective human rights systems by international standards. It is important that any reform to the current human rights system preserve these functions, and the ability to carry them out fully and effectively.

3. Cooperation

An effective human rights system requires the establishment of state institutions that are willing and able to establish and strengthen cooperative relationships with other organizations and groups involved in the system. Such cooperation needs to be extended to the full range of stakeholders who play a vital role in the human rights system, including NGOs, other human rights bodies and state institutions, and international human rights organizations.

Under the current system, the OHRC is uniquely placed to act as a communication hub and catalyst for human rights activity. It is involved in promotional, educational and policy development activities that include consultation and cooperation with a wide range of stakeholders and the wider human rights community, both nationally and internationally.

This effectiveness factor is incorporated as an actual aspect of the OHRC's structure. The integration of the OHRC's legal, policy and investigative functions facilitates cooperation throughout the full exercise of the OHRC's operations.

The fulfillment of this effectiveness factor requires that a state institution act to coordinate human rights activity. It is difficult to envision this factor being fulfilled effectively without the existence of a human rights institution that in some manner encompasses a range of functions.

4. Adequate Power

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[30]See *International Covenant on Civil and Political Rights*, 19 December, 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47; and *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46.

An effective human rights system requires state institutions that are vested with adequate power to accomplish objectives and functions established in legislation. It is important to emphasize that both excessive and insufficient power to carry out functions may be dangerous and counterproductive to the effective functioning of state institutions. For example, where a human rights institution is charged with investigating human rights issues, it is essential that it be vested with sufficient powers to enable it to effectively obtain information from powerful institutions, while at the same time, care must be taken to prevent abuse of the rights of respondents. Adequate power requires a careful balancing of powers in relation to mandated functions.

In the current system, the OHRC is vested by the *Code* with the power to inquire into and investigate a wide range of human rights matters, including complaints from the general public alleging violations of the *Code*. Accordingly, the *Code* entrusts the OHRC with a range of powers related to these inquiry and investigation functions. In addition, the HRTO is vested with a wide range of remedial powers. These powers have been used to ensure public interest remedies and to prevent potential future human rights violations.

A number of questions arise from the perspective of this effectiveness factor. Are the powers afforded to the OHRC and HRTO adequate to address the range of current human rights issues? For example, have the investigatory powers afforded to the OHRC been adequate to compel cooperation from large institutional respondents to human rights complaints? Also, where may the intake, screening, mediation, and investigation of human rights complaints be best effected? For example, some have suggested that all of these functions could be performed by the HRTO. Others have suggested that such a shift would be very costly, and inhibit access to justice by having this function performed by a more judicialized body.

5. Accessibility

An effective human rights system requires that state institutions are readily accessible. All aspects of institutional and organizational design and structure affect accessibility. Prominent factors affecting accessibility include physical location and design, employment of communication technology, receptivity of service, perception of service, timeliness of service provision, and representative composition of membership and staff.

In the current system, the OHRC has central headquarters in Toronto and human rights officers investigating and mediating human rights complaints across the province. The OHRC provides a toll free central inquiry phone service and responds to electronic and surface mail. Human rights complaints can be filed without the need to come to central facilities, and forms and procedures are

designed to minimize the need for legal support. The HRTO conducts hearings at its headquarters in Toronto and in regional centres. Both the OHRC and the HRTO provide accommodation to the point of undue hardship for service delivery when special needs are identified.

From the perspective of this effectiveness factor concerns have been raised about whether:

- the OHRC's services are sufficiently culturally attuned to the needs of disadvantaged and vulnerable communities including particularly, First Nations, racialized groups, disability groups, and impoverished individuals,
- the current system, under which the OHRC performs the gatekeeping function rather than the HRTO, may be an undue barrier to access, and
- the complexity of the human rights system may act as a barrier to individuals who are marginalized.

Another crucial aspect of accessibility relates to the capacity of financially disadvantaged individuals to access the system, and to seek and receive redress for human rights violations. Leaving complainants to their own resources to fund the search for redress may constitute a significant barrier. The cost of having to seek remedies for a human rights violation should not be a barrier to the universal protection provided by the *Code*. This includes an individual's ability to affirm his or her rights in spite of the inevitable power imbalance that occurs when challenging large organizations or institutions that have ample access to legal resources. In these circumstances, it becomes the responsibility of the human rights system to ensure a uniform application of the *Code* and its principles across all sectors of society.

Accessibility issues are a fundamental concern that should be accounted for in any human rights system.

6. Operational Efficiency

An effective human rights system must ensure that state institutions are efficient and effective in operation. Lack of operational efficiency can have the effect of undermining public confidence and utilization of human rights services. Efficiency is a requirement in all aspects of an organization's operation including structural design, interpretation and implementation of procedure, project and program design and management, staff training and development, and human resource matters.

A critical component in operational efficiency for state institutions is the provision of adequate resources. Adequate and continuous funding is a prerequisite for operational efficiency. Insufficient funds will undermine the work of any organization, no matter how efficiently it is administered and managed. Adequacy

of funding needs to be measured against the functions and procedural requirements imposed by founding legislation.

Over the past decade, the OHRC has repeatedly expressed concerns about its funding levels. During this time concern was also raised about long delays in the handling of human rights complaints, which led to a number of major administrative and management initiatives to enhance the OHRC's operational efficiency.[31] The implementation of these operational efficiency initiatives has significantly reduced the long delays in the handling of human rights complaints.

From the perspective of this effectiveness factor, concern continues to be expressed that complaints still take too long to handle, especially complaints that pass the mediation phase and enter into the investigation phase of the OHRC's process. Significant increases in the number of complaints being filed in the last two years also threaten to lead to the re-development of a backlog situation.

Operational efficiency, with adequate resources being an integral factor, is key in considering any reform to the human rights system in Ontario.

7. Accountability

An effective human rights system requires that all state institutions are accountable to the state, to the public, to groups and communities, and to the individuals that use its services. Measures to maintain accountability include formal and informal reporting requirements and responsibilities, and practices of transparency and consultation.

In the current system, the OHRC is required by the *Code* to formally and annually report on its activities to the Minister of Attorney General. In addition, it provides regular reports of its activities on its website and through issuing news releases and statements. The OHRC also consults with stakeholders on a wide variety of issues dealing with its own procedures and practices as well as on the development of substantive human rights policies.

Concerns have been expressed about the appointment process for both OHRC Commissioners and HRTO adjudicators, on the basis that the process lacks transparency. Some have indicated that human rights expertise is not given sufficient weight when selections are made, and that these bodies are not sufficiently reflective of the communities which they serve.

It is also of concern that general information about the HRTO, such as budget levels and operational statistics, is not available to the public.

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[31] For greater detail, please refer to the section of this paper entitled "History of Internal Reform at the OHRC".

From the perspective of this effectiveness factor, it is important that any government reform to the human rights system is seen as the result of a transparent consultative process with all relevant stakeholders, and that any reformation to the system maintains high standards for the accountability of all state institutions and private actors involved.

C. Principles of Administrative Law in the Human Rights Context

There are legal requirements and principles governing administrative agencies in Canada which complement and mirror the *Paris Principles*. These are encompassed in the area of administrative law.

To determine what principles and requirements of administrative law apply to the creation of a viable human rights model, it is important to understand the context in which administrative agencies are created. Much of government authority is delegated to legislatively-created agencies. This includes everything from school, library and police services boards, to various commissions and adjudicative tribunals. Both the OHRC and the HRTO are examples of such agencies.

1. Rationale for Administrative Agencies

Administrative agencies are usually founded to deal with realms of activity in which there is significant public interest in keeping the subject matter in question under government control. Such agencies have a number of inherent advantages. Establishing an agency to address a specific area of law provides an identifiable institution to focus attention, develop expertise, formulate and promote the public interest, and respond to public complaints and concerns. In addition, it is generally acknowledged that the delegation of powers to a specific agency is cost effective in comparison with retaining powers within a legislature.

Administrative agencies with adjudicative functions, are also created due to the recognition that the civil court system is inaccessible to most members of the public. The workings of the civil court system are governed by lengthy and complex rules, as well as by years of procedural jurisprudence. The civil court system traditionally offers little or no assistance to the unrepresented individual. As a result, the civil court system requires that individuals retain counsel to represent them through the process. This is prohibitively expensive for the average person. In addition, the ability of courts to award costs against a losing party creates a chilling effect on the would-be litigant. As a result of complexity and the associated costs, the civil court system has become overburdened,

resulting in undue delay in the processing of cases. Even simple claims, such as those in the small claims court system, can take years to reach trial.

In contrast to the courts, administrative agencies are meant to offer a simpler streamlined process that allows for more speedy access to a hearing. Effectively designed administration agencies provide simplified operations and active support for individuals working through their processes. As a result they should allow greater access to the layperson and reduce disadvantage to unrepresented parties. Rarely are administrative bodies empowered to award costs like the courts. As a result individuals are not discouraged from pursuing their claims for fear of losing. Judges assigned to hear cases in the civil court system may or may not have the necessary expertise in the particular area of law being considered. Ideally, administrative agencies are staffed with individuals who are expert in the area of law covered by their statutory mandate.

2. Duty of Fairness and Retention of Procedural Simplicity

All decision makers in the arena of administrative law are under a duty to act fairly. The principle purpose of the duty of fairness is to:

a) ensure parties have adequate notice of the case that they have to meet;
b) provide a meaningful opportunity for those interested to bring relevant evidence and arguments to the attention of the administrative decision-maker; and
c) ensure that the decision-maker, in coming to a decision, fairly and impartially considers all evidence and arguments before it.[32]

With regards to the decision-makers themselves, they must be both free from bias and appear to be free from bias. An important component of this is that the decision-maker be independent. They are also required to use their decision-making powers to promote the policies and objects of the governing Act.[33]

What the foregoing actually entails will depend on context. The duty of fairness applies to a wide range of decision-making powers in the administrative law context ranging from issuing dog licenses to tribunal hearings on potential human rights breaches. Therefore, the precise procedural content of the duty of fairness will depend upon the particular administrative and legal context to which it is being applied.[34]

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[32] S. Blake, *Administrative Law in Canada* (Markham: Butterworths Canada Ltd., 2001) at 12

[33] S. Blake, *supra*, at 89-108

[34] Brown and Evans, *supra*, at Chapter 7:1330, pages 7-10 and 7-11

Balanced against the need for procedural fairness is the need to retain the procedural simplicity that aids both speed and affordability, both to the parties involved and to the taxpayer.

As noted above, court systems are more expensive, cumbersome and complex than administrative tribunals. The civil court system has highly structured rules regarding all aspects of its process including: pleadings, disclosure, discoveries, preliminary motions, the presentation of evidence and arguments at trial and appeals of interim and final decisions. These have been created as elaborate safeguards to procedural fairness. However, the concomitant to extensive procedure is generally significant expense and delay. Inevitably, the closer a tribunal or commission comes to replicating a court system with its rules and procedural requirements, the more "expensive" that tribunal or commission will be in terms of money, delay and ultimately inaccessibility.[35]

Taken as a whole, therefore, the principles of administrative law, coupled with the duty of fairness, require that any viable human rights model include the following:

a) **accessibility** to the public;
b) **independence** from government to ensure impartiality;
c) **broad power** sufficient to fulfil its mandate of forwarding human rights in Ontario;
d) **operational efficiency** in the speed with which claims are processed and the costs incurred in doing so; and,
e) **fairness** in ensuring that parties are able to present all necessary evidence and arguments to the decision-maker at each stage of the process and address in turn the evidence and arguments offered against them, and that the matter is decided by a decision-maker who is free from bias and appears free from bias.

VI. Conclusion

Reform of the human rights system is a vital and significant challenge for government and society. The formulation of problems and the potential for reform in such a complex system must carefully balance all factors and the concerns and needs of all stakeholders. Change must only be undertaken with full awareness of possible consequences. Many different changes have been suggested: it is difficult to determine which of these will truly maximize outcomes for the benefit of all.

An essential part of effective change is an open process that involves wide and diverse public consultation. All interested parties must have an opportunity to

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[35] Brown and Evans, *supra* at Chapter 7:1220 at pages 7-4 and 7-5

provide input, and all decisions must be made in an open and transparent fashion.

VII. Participating in the Consultation Process

The Commission regards this Discussion Paper as the first step in establishing such a process. To help focus the discussion, the Commission has developed Consultation Questions that build on the contents of this Discussion Paper. Appendix 2 lists these Questions.

Individuals are invited to complete the Consultation Questions and return them to the Commission by mail or fax or via the website, prior to **September 14, 2005**. Submissions may be sent to:

Policy and Education Branch
"Reviewing Ontario's Human Rights System"
Ontario Human Rights Commission
180 Dundas Street West, 7th Floor
Toronto, Ontario M7A 2R9
Fax: (416) 314-4533
E-mail: humanrightsreview@ohrc.on.ca

In addition, all documents related to this consultation, including this Discussion Paper and Consultation Questions, are available on our website at www.ohrc.on.ca. Consultation Questions can be filled out directly on our website. Should you have any questions about the consultation process, you may contact the OHRC by telephone at (416) 314-4549, or by TTY at (416) 314-6526 or toll-free at 1-800-308-5561.

Information provided during the consultations is subject to the requirements of the *Freedom of Information and Protection of Privacy Act*. The information obtained during the consultation may be made public.

The Consultation Questions will also be employed to structure focus group sessions. Focus group members will be recruited from the range of key stakeholders and invited to attend sessions in September 2005. A consultation report will be developed in the Fall of 2005.

APPENDIX 1: PARIS PRINCIPLES

Principles relating to the status of national institutions – "*Paris Principles.*" [36]

Competence and responsibilities

1. A national institution shall be vested with competence to promote and protect human rights.
2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.
3. A national institution shall, *inter alia*, have the following responsibilities:
    a. To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:
        i. Any legislative or administrative provisions, as well as provisions relating to judicial organizations, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;
        ii. Any situation of violation of human rights which it decides to take up;
        iii. The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;
        iv. Drawing the attention of the Government to situations in any part of the country where human rights are violated and

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[36] *Principles Relating to the Status of National Institutions*, annex to *National Institutions for the Promotion and Protection of Human Rights*, CHR Res. 54, UN ESCOR, 1992, Supp. No. 2 of UN Doc. E/1992/22, chap. II, sect. A; GA Res. 48/134, UNGAOR, 1993, Annex.

making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government;

b. To promote and ensure the harmonization of national legislation regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;

c. To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;

d. To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence;

e. To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights;

f. To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;

g. To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.

Composition and guarantees of independence and pluralism

1. The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:

   a. Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;

   b. Trends in philosophical or religious thought;

   c. Universities and qualified experts;

   d. Parliament;

e. Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).

2. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.
3. In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.

Methods of operation

Within the framework of its operation, the national institution shall:

a. Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner;
b. Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;
c. Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;
d. Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly convened;
e. Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;
f. Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular ombudsmen, mediators and similar institutions);
g. In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.

Additional principles concerning the status of commissions with quasi-jurisdictional competence

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. In such

circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

a. Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;
b. Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;
c. Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;
d. Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.

APPENDIX 2: CONSULTATION QUESTIONS

Personal Information

Name:
Contact Information:
Occupation:
Organization:

Questions:

1. Making reference to the principles outlined in the Discussion Paper and given the state of the current human rights system in Ontario, do you have concern that the fulfillment of any of the following international human rights effectiveness factors and domestic administrative law requirements is not being maximized:

   Please identify only those areas where you have concerns.

   - *Independence* (state institutions are capable of acting independently of power brokers in society, particularly government)
     - What are your concerns?
     - What reforms do you feel would best address these concerns?

   - *Defined Jurisdiction* (state institutions are endowed with clearly defined mandates that in totality cover off all relevant internationally recognized protected rights and functions necessary for an effective human rights system)
     - What are your concerns?
     - What reforms do you feel would best address these concerns?

   - *Cooperation* (state institutions are able and willing to establish and strengthen cooperative relations with other actors in the human rights system)
     - What are your concerns?
     - What reforms do you feel would best address these concerns?

   - *Adequate Power* (state institutions are vested with adequate power to accomplish all mandated objectives and functions)
     - What are your concerns?
     - What reforms do you feel would best address these concerns?

   - *Accessibility* (state institutions are accessible to individuals and groups whose interests they are established to protect and promote)
     - What are your concerns?

- What reforms do you feel would best address these concerns?

- *Operational Efficiency* (state institutions are efficient and effective in operation)
  - What are your concerns?
  - What reforms do you feel would best address these concerns?

- *Accountability* (state institutions are accountable to all stakeholders)
  - What are your concerns?
  - What reforms do you feel would best address these concerns?

- *The administrative duty of fairness, balancing with the demands of procedural simplicity*
  - What are your concerns?
  - What reforms do you feel would best address these concerns?

2. Below is a list of potential actors in a human rights system. Please identify the specific actors with regard to whom you wish to make comment. Please respond to the questions raised bearing in mind the contents of the Discussion Paper.

- *State human right institution(s)*
  - What should be the roles, responsibilities, and structures of state human rights institution(s) in Ontario?
  - Are there reforms to the role, responsibilities, and structures of the OHRC and the Ontario Human Rights Tribunal that you feel would be beneficial for the Ontario's human rights system?
  - If proposing change, what would be strengths and weaknesses of the proposed changes?

- *The Provincial Government*
  - Are there reforms to the role of the Government and the Ministry of Attorney General (as the current Ministry responsible for Provincial human rights institutions) that you feel would be beneficial for Ontario's human rights system?

- *Administrative Tribunals that participate in Ontario's human rights system* (For example, the Special Education Tribunal, Workplace Safety and Insurance Board, the Ontario Labour Relations Board, the Ontario Rental Housing Tribunal, labour arbitrators, *etc.*)
  - What should be the roles of these types of bodies in the human rights system in Ontario?

- Are there reforms to the roles of these types of bodies that would benefit the human rights system in the Province?

- *Other Government bodies that participate in Ontario's human rights system* (For example, the Accessibility Directorate, the Women's Directorate, the Seniors' Secretariat)
  - What should be the roles of these types of bodies in the human rights system in Ontario?
  - Are there reforms to the roles of these bodies that would benefit the human rights system in the Province and what would they be?

- *Non-Government Organizations that participate in Ontario's human rights system* (For example, legal clinics, advocacy groups, private corporations)
  - What should be the roles of these bodies in the human rights system in Ontario?
  - Are there reforms to the roles of these organizations that would benefit the human rights system in the Province and what would they be?

- *Governments of other jurisdictions* (such as municipal and federal governments, and the United Nations)
  - What interaction and coordination should happen and would benefit the human rights system in the Province?
  - How do we enhance the interaction and coordination between these participants to improve the human rights system in the province?